Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration

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I. INTRODUCTION

Since the mid-1980s, companies have introduced broad arbitration agreements into many of their pre-dispute consumer contracts.[1] The use of arbitration has become popular because alternative dispute resolution (ADR) processes have the ability to save considerable time and money compared to litigation.[2] These agreements usually purport to apply to all claims arising under the transaction, but they rarely contemplate the possibility of class-action litigation or arbitration,[3] a procedure that is being increasingly requested in arbitrations.

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[1] *See, e.g.*, Johanna Harrington, Comment, *To Litigate or to Arbitrate? No Matter—The Credit Card Industry Is Deciding for You*, 2001 J. DISP. RESOL. 101, 102 (2001) (describing the increased use of arbitration clauses by credit card companies); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 831 (2002) ("Since the mid-1980s, companies have increasingly used contracts of adhesion to require consumers, employees, and other 'little guys' to resolve any future disputes with the company through private binding arbitration rather than in court."); Thomas J. Stipanowich, *Resolving Consumer Disputes: Due Process Protocol Protects Consumer Rights*, 53 DISP. RESOL. J. 8, 9 (1998) ("Binding arbitration provisions are now a common feature of banking, insurance, health care, and communication service contracts, as well as arrangements for the sale or lease of consumer goods."); Eric Weiner, *Darcy Ting Defeated AT&T, Yet the Consumer-at-Large, Again Has Lost*, 4 CARDOZO ONLINE J. CONFLICT RESOL. 1, 1 (2002), *available at* http://www.cardozojcr.com/vol4no1/notes02.html. ("Recently, binding arbitration clauses have become a routine component of nearly all consumer service agreements.").

[2] There are also other advantages to ADR procedures. *See* STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 210 (4th ed. 2003) (discussing potential advantages for choosing arbitration over litigation, including having an expert as an arbitrator, knowing the decision of the arbitrator is binding; having a confidential procedure, proceeding in an informal manner, and having the opportunity to save time and money).

[3] It is rare for the arbitration agreement to be any more informative than "all disputes arising under this agreement will be subject to binding arbitration." In some cases, the

A handful of class arbitrations have been conducted to date, and most of these have involved significant judicial intervention from local district courts. However, because the procedures are confidential, the exact methods followed by the arbitrators are unknown. The Supreme Court's recent opinion in *Green Tree Financial Corp. v. Bazzle*[4] now casts doubt on whether these procedures are consistent with the Federal Arbitration Act.[5] In order to fill this legal void, the arbitral provider organizations have begun to create rules and standards of fairness in both consumer and class-action arbitrations.[6]

In order to determine how class actions should proceed, there are three models that could be expanded to encompass the need for class arbitration. First, class-action arbitrations could expand upon rules already in place for consolidations. Many courts already have the authority to order arbitrations involving similar facts or arising out of the same transaction consolidated into one arbitration.[7] Second, the California courts have established a

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company will specify that the arbitration will be governed by specific rules, such as those for the American Arbitration Association (AAA), the National Arbitration Forum (NAF), or Judicial Arbitration and Mediation Services (JAMS). In very rare circumstances, the company will disclose the actual terms of the arbitration agreement, including the procedures that would govern the arbitration.

On its website, NAF offers examples of potential arbitration agreements in a variety of circumstances. However, even these "approved" examples say little more than that the dispute will be arbitrated and that the right to a jury trial has been waived. NATIONAL ARBITRATION FORUM, DRAFTING MEDIATION AND ARBITRATION CLAUSES: A PRACTICAL GUIDE WITH SAMPLE PROVISIONS 6–18 (2003), *available at* http://www.arb-forum.com/articles/whitepapers/clz903.pdf.

[4] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003). *See infra* Part II for a more complete discussion of *Bazzle* and its effects on arbitration law.

[5] Many of the complexities involved in arbitration law stem from the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2000), a sparse statute governing little other than the enforceability of arbitration agreements and the procedures for judicial review of an arbitrator's agreement. Notably, the FAA does not provide guidance on the arbitration procedure itself, such as choosing an arbitrator, determining procedures, and providing for fees. As a result, the arbitrator provider services, such as the AAA, the NAF, and JAMS, have created their own rules that are presumably consistent with the silence in the FAA.

[6] *See infra* Part VI.C.

[7] Consolidated arbitration and class-action arbitration are two distinct procedures. In a consolidation, an arbitrator will hear more than one similar claim in a single proceeding, and all of the claims have previously been filed. In a consolidation, all of the parties are "at the table." In a class action, one plaintiff or group of plaintiffs acts as a representative for many other absent parties. The absent parties do not have to file their

"hybrid" of arbitration and litigation in order to conduct class arbitration.[8] This approach allows the courts to make determinations of certification and notice, but permits the arbitrator to rule on the merits of the claim. A third approach was taken by the American Arbitration Association (AAA). It created the Supplemental Rules for Class Action Arbitration,[9] which closely follow the requirements of Rule 23 of the Federal Rules of Civil Procedure, but allow the arbitrator to make the determinations of certification and notice, subject to judicial review at various stages.

This Article examines how the standards of class action litigation can be incorporated into class arbitration to create a process that is efficient and fair. Part II addresses the threshold issue of arbitrability and the impact of *Green Tree v. Bazzle* on class arbitration. Part III analyzes federal law and policies governing class action litigation. Part IV addresses the issue of waiver of the protections of federal court. Part V examines aspects of arbitration that may jeopardize the fairness of class arbitration. Part VI critiques consolidation, the "hybrid" class arbitration, and the new AAA Supplemental Rules. Finally, Part VII sets forth a new approach to class arbitration, giving increased power to the arbitrators to fully conduct class action arbitrations, subject to a broader judicial review than is currently available under the Federal Arbitration Act (FAA). This approach promotes judicial economy while maintaining a process that is fair to absent class members.

II. THE FIRST QUESTION—ARBITRABILITY OF CLASS-ACTION CLAIMS

In general, the issue of arbitrability concerns whether the court or the arbitrator will hear specific questions in the first instance.[10] Traditionally, the Supreme Court separated arbitrability questions into two categories: questions of "procedural" arbitrability and questions of "substantive" arbitrability.[11] Arbitrators typically hear questions of procedural arbitrability, *i.e.*, claims and defenses under a valid arbitration agreement, while courts hear questions of substantive arbitrability, *i.e.*, claims and defenses to the

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own claims to be part of the class. *See infra* Part VI.A for more information on consolidation.

[8] *See infra* Part VI.B for more information on the California "hybrid" approach.

[9] *See infra* Part VI.C for more information on these AAA rules.

[10] *See* GOLDBERG ET AL., *supra* note 2, at 230 ("Arbitrability addresses whether the parties agreed to arbitrate the merits of a particular claim.").

[11] *See id.*; *see also* Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 835–36 (2003) (describing the differences between substantive and procedural arbitrability).

arbitration agreement itself or its applicability to a particular claim.[12] The Supreme Court has held that the courts are to determine whether an arbitration agreement is valid,[13] or if the arbitration clause covers the claim at hand.[14] Conversely, the Court has held in a line of cases that the arbitrator is to hear other defenses to the arbitration agreement, such as fraud in the inducement of the parts of the contract *other* than the arbitration agreement,[15] the validity of a statute of limitations defense,[16] and now even whether a claim should progress as a class action.[17]

Prior to *Bazzle*, the lower courts resolved the question of arbitrability of class claims in contracts that are silent on the issue of class-action arbitration in two different ways. The majority approach was for the courts to refuse to

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[12] Reuben, *supra* note 11, at 835–36. Professor Reuben notes:

> [S]ubstantive arbitrability is understood to focus on the question of whether a dispute is encompassed by an agreement to arbitrate. The focus here is on the substantive merits of the particular dispute, and whether the parties agreed to include it within the submission to arbitration. Procedural arbitrability, on the other hand, focuses on a different question: whether any conditions that might trigger a duty to arbitrate under an enforceable arbitration provision have been fulfilled. This includes such procedural issues as time limits, notice, waiver, estoppel, and other conditions precedent to the obligation to arbitrate. Under the doctrine of procedural arbitrability, these issues are decided by the arbitrator, not the court, on the theory that they are included within the scope of the arbitration provision.

Id. at 835.

[13] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (holding that the court of appeals correctly determined that because arbitration agreement was not signed by both parties, the court should determine whether the parties even intended on submitting their claim to arbitration).

[14] *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452 (2003) (holding that courts determine "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy") (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 89 (2002)).

[15] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967) (holding that a presumably valid agreement to arbitrate can be separated from the rest of the contract, thus allowing the arbitrator to hear defenses, such as fraud, of the rest of the contract).

[16] *See Howsam*, 537 U.S. at 86 (holding that because agreement to arbitrate was valid and because the court could not find any intention for the parties to submit the statutes of limitations question to a court, the arbitrator should hear that claim in the first instance).

[17] *Bazzle*, 539 U.S. at 453–54.

certify classes and then send individuals to arbitration.[18] A minority of courts, namely state courts in California and Pennsylvania, held that courts could certify claims for class arbitration.[19] These approaches have one fundamental thing in common: They both require that the court, rather than the arbitrator, make the initial decision on the availability of a class action procedure.

The Supreme Court's decision in *Bazzle* essentially overruled all of these lower court decisions on the issue of arbitrability. The Court held that an *arbitrator*, rather than a court, should decide in the first instance whether class-action arbitration is appropriate.[20] The Court stated that, "Under the

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[18] The leading case under this approach was *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). The *Champ* court held that a court cannot certify a class action in the absence of a provision in the arbitration agreement specifically allowing for such a procedure. *Id.* at 276–77. Following *Champ*, this approach became the majority approach for many of the other federal circuits that addressed this issue. *See* Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001); Randolph v. Green Tree Fin. Corp.-Alabama, 244 F.3d 814 (11th Cir. 2001); Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000).

As a result of these rulings, companies could avoid class arbitration simply by having an arbitration agreement that was silent on this issue. For this reason, *Champ* was regarded as highly controversial. *See* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5 (2000) (noting that companies are using mandatory binding arbitration clauses as a way to keep themselves out of class action litigation). *See also* Lindsay R. Androski, Comment, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 633 (2003) (criticizing those who advocate for increased use of arbitration clauses by businesses hoping to draft around class litigation); Scott S. Megregian & Todd Babbitz, *The Use of Mandatory Arbitration to Defeat Antitrust Class Actions*, 13 SUM ANTITRUST 63, 64 (1999) (finding that arbitration can destroy the ability for plaintiffs to be class representatives, and it can destroy typicality, a prerequisite for a class action). *But see* Edward Wood Dunham, *The Arbitration Clause as a Class Action Shield*, 16 SPG FRANCHISE L.J. 141, 141–42 (1997) (stating that the use of an arbitration clause can be an "effective tool" for companies to manage the risks of being involved in class litigation).

[19] The California case, *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), was the first case in which a court allowed class arbitration and certified the case to be heard by an arbitrator. In making this decision, the *Keating* court noted that arbitration and litigation could work together in order to create a fair and efficient alternative means of resolving this dispute. *Id.* at 1209–10. The Pennsylvania Superior Court, in *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991), followed the *Keating* rule.

[20] *Bazzle*, 539 U.S. 444, at 451–52.

terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide."[21]

A large portion of the Court's plurality opinion considered the boundaries of a court's role in enforcing arbitration agreements.[22] The Court acknowledged that parties to an arbitration agreement might expect a court to answer some questions of arbitrability,[23] such as whether the agreement is valid or whether it applies to the underlying dispute; however, the Court appeared to give almost every other question of arbitrability to the arbitrator to decide.[24] The effects of this decision are twofold: (1) It increases power given to arbitrators by abandoning the "procedural" and "substantive" delineation[25] and (2) it seemingly endorses increased arbitrator involvement in class-action arbitration.

The terse opinion that the Court issued in *Bazzle* leaves many questions unanswered. Although *Bazzle* clearly asserts that the arbitrator decides the appropriateness of class-action arbitration, the opinion gives no guidance on when such a finding is appropriate or how a class action should proceed. Two issues are particularly pressing. First, it is unclear whether parties can "contract around" the Court's decision in *Bazzle* by expressly prohibiting class-action arbitration. The arbitrator's powers are always limited by the scope of the agreement,[26] and if an arbitrator exceeds his or her powers, a court will vacate the award.[27] Thus, it would seem that a company could explicitly prohibit class-action arbitrations in order to avoid the situation in *Bazzle*. There is one potential safeguard from a wholesale prohibition of class

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[21] *Id.* at 451.

[22] In *Bazzle*, the Supreme Court did not focus its attention on § 4 of the FAA and the power of a court to enforce an arbitration agreement.

[23] The Court seemingly ignores the terms "procedural" and "substantive" arbitrability. Instead, the plurality opinion appears to delineate between questions involving validity and applicability and all other questions. In this way, the scope of arbitrator questions has increased tremendously.

[24] *See Bazzle*, 539 U.S. at 452–53.

[25] A discussion on the new limits of an arbitrator's power is beyond the scope of this paper. For more information on this subject, see Kristen M. Blankley, Note, *Arbitrability After* Green Tree v. Bazzle*: Is there Anything Left for the Courts*, 65 OHIO ST. L.J. 697 (2004).

[26] The FAA recognizes that one of the grounds for review is if the arbitrator exceeds his or her powers. 9 U.S.C. § 10(4) (2000).

[27] *Id.*

arbitration—the doctrine of unconscionability.[28] However, this question is beyond the scope of this article.

Second, it is unclear how the class arbitration should proceed. The decision in *Bazzle* does not address the role of courts in a class arbitration. This is the first time that the Supreme Court has addressed the issue of class action arbitration, and its reluctance to discuss class procedure is alarming. The tenor of the opinion is that arbitrators are capable people who are competent to handle the arbitrability question.[29] It would not be surprising if the Court were to later hold that an arbitrator, rather than the court, should handle not only the merits of the claim but also the issues of certification and notice. Furthermore, because the FAA imagines a limited role for the judiciary,[30] it is uncertain if the judiciary could be involved on issues other than enforcement of the agreement, entry of the award, or a limited judicial review.

III. CURRENT CLASS ACTION REQUIREMENTS IN FEDERAL COURT

Because there are few guidelines on how a class-action arbitration should proceed, it is appropriate to turn to the Federal Rules of Civil Procedure for guidance.[31] Rule 23 is widely regarded as a fair rule that protects the rights of the litigants before the courts, and a similar rule in arbitration should likewise protect parties in class-arbitration. Since consumer class actions are almost

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[28] There is currently a split among courts as to whether banning class relief is a basis for finding that an arbitration agreement is unconscionable. *Compare* Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003) (finding an arbitration agreement prohibiting class-action arbitration substantively unconscionable), *with* Rosen v. SCIL, LLC, 799 N.E.2d 488, 494 (Ill. App. Ct. 2003) (holding that a prohibition on class action arbitration does not make a contract unconscionable). For more information regarding the unconscionability of class action arbitration clauses, see generally Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004).

[29] *Bazzle*, 539 U.S. at 452–53 (stating that arbitrators are "well suited" to handle questions of contract interpretation, including the question of whether a contact allows or disallows class-action arbitration); *see also* Bellevue Drug Co. v. Advance PCS, No. CIV.A.03-4731, 2004 WL 1924964, at *8 (E.D. Pa. Aug. 20, 2004).

[30] *See, e.g.*, 9 U.S.C. § 4 (2000).

[31] Certainly, each state has rules of civil procedure regarding class actions, and each state has courts competent to handle these claims. For ease of discussion, however, this paper will focus on the federal courts and the Federal Rules of Civil Procedure.

exclusively actions for monetary damages under Rule 23(b)(3), this discussion of class action law will be limited to the damages class action.[32]

A. *Prerequisites for a Class*

The Federal Rules set forth four explicit prerequisites that must be met before a class can be certified.[33] These four requirements are commonly known as numerosity, commonality, typicality, and representativeness.[34]

The first requirement, numerosity, refers to the number of people in the proposed class. A class can only be maintained if there is a significantly high number of people affected by the defendant's action, so that the traditional rules regarding joinder would be "impracticable."[35] Although there is no minimum number of plaintiffs set by statute, courts have certified classes ranging from "a few score"[36] to hundreds of plaintiffs.

Secondly, the action must have commonality, or a similar question of law or fact.[37] Commonality has been described as "the idea that [a] class should be a class."[38] In order for the requirement of commonality to be satisfied, the damage done to each individual plaintiff must be similar, or it must arise out of the same set of circumstances. Although commonality can still exist even if there are individual questions,[39] commonality does not extend to a class in which each plaintiff must individually prove liability and damages.[40]

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[32] There are two other instances in which a class procedure is allowed under Rule 23. First, a class action can be maintained to prevent "incompatible standards" in cases with a limited fund. FED. R. CIV. P. 23(b)(1). Second, a class action may be maintained in order to obtain injunctive relief, and these cases usually involve civil rights. FED. R. CIV. P. 23(b)(2).

[33] FED. R. CIV. P. 23(a).

[34] *Id.*

[35] *Id.* (stating that a class action can only be maintained if "the class is so numerous that joinder of all members is impracticable").

[36] STEPHEN C. YEAZELL, CIVIL PROCEDURE 964 (5th ed. 2000).

[37] FED. R. CIV. P. 23(a) (stating that there must be "questions of law or fact common to the class").

[38] YEAZELL, *supra* note 36, at 964.

[39] *See, e.g.*, *In re* Prudential Ins. Co. of Am. Sales Practice Litig., 148 F.3d 283, 310 (3d Cir. 1998); Forbush v. J.C. Penney Co., 994 F.2d 1101, 1106 (5th Cir. 1993); Johnson v. American Credit Co. of Georgia, 581 F.2d 526, 532 (5th Cir. 1978); Mosley v. General Motors Corp., 497 F.2d 1330, 1334 (8th Cir. 1974).

[40] *See, e.g.*, Sprague v. General Motors Corp., 133 F.3d 388, 398 (6th Cir. 1998) (citing Jensen v. Sico, Inc., 38 F.3d 945, 953 (8th Cir. 1999)); Benner v. Becton

The third requirement is typicality.[41] To determine if typicality has been met, the court must examine the claims of the class representatives and determine if they are in line with the claims of the rest of the class.[42] In order to protect the absent class members, the representatives must be just that, representatives of the class. If the class representatives have a claim sufficiently unlike the claims of the class members, then any judgment that might be received will have different effects on different people, defeating the purpose of the class action.[43] Although typicality is important, the claims of the representatives do not have to be *identical* to the claims of the rest of the class.[44]

The fourth statutory requirement is adequacy of representation.[45] There are many aspects to adequacy of representation. First, the named representative must have an actual stake in the claim. If the named representative does not have a stake in the claim, then someone else should be named.[46] Second, the lawyer cannot be tainted by having a relationship with the client, such as a familial relationship, that would jeopardize the lawyer's independence.[47] Finally, the lawyers themselves must be adequate, meaning that they must be skillful enough to handle a class and either they or

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Dickinson & Co., 214 F.R.D. 157, 164–67 (S.D.N.Y. 2003) (finding no common question of law or fact in a products liability claim in which the products and damage were different for each class member); Fuzie v. Manor Care, Inc., 461 F. Supp. 689, 700–01 (N.D. Ohio 1977) (holding that the claims were so individualized that there were no common questions of law or fact).

[41] FED. R. CIV. P. 23(a) ("[T]he claims or defenses of the representative parties are typical of the claims and defenses of the class.").

[42] Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130, 139 (2003) ("[T]he claims of the class representatives have the same general characteristics as those of the class.").

[43] The purpose of a class action is to efficiently handle a matter on behalf of a large number of people in a manner that is fair and that does not jeopardize due process of law. *Id.* at 130.

[44] Communities for Equity v. Michigan High School Athletic Assn., 192 F.R.D. 568, 573 (W.D. Mich. 1999); Markham v. White, 171 F.R.D. 217, 223 (N.D. Ill. 1997); Calkins v. Blum, 511 F. Supp. 1073, 1088 (D.C.N.Y. 1981) (holding that claims under various social welfare states are still typical for the purposes of Rule 23).

[45] FED. R. CIV. P. 23(a) ("[T]he representative parties will fairly and adequately protect the interests of the class.").

[46] *See* YEAZELL, *supra* note 36, at 965.

[47] *Id.*

their firms must have the financial resources to be able to support this type of complex litigation.[48]

Adequacy of representation is not only required by Rule 23, but is mandated by the Due Process Clause of the Constitution. As early as 1940, the Supreme Court recognized that due process in class actions required that absent class members be adequately represented by the named parties; otherwise, another person's judgment cannot bind a litigant who did not participate in the lawsuit.[49] The due process rights of individuals are jeopardized when "it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it."[50] The Court did not specifically state what type of process is due for the absent class members, but it did note that absent class members can only be bound by a class action judgment if "they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties."[51] Thus, if the parties are not adequately represented in the litigation, the absent class

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[48] *Id.* One of the 2003 amendments to Rule 23 includes the addition of section 23(g) on the appointment of class counsel. Under 23(g)(1)(A), the court that certifies the class must also appoint the counsel to represent the class. The class counsel must "fairly and adequately represent the interests of the class," FED. R. CIV. P. 23(g)(1)(B), a similar requirement to the one in Rule 23(a). In making this appointment, the court is directed to consider several factors relating to the attorney's experience, knowledge, and financial resources. FED. R. CIV. P. 23(g)(1)(C)(i). The court can also consider any other matter that may affect the case, FED. R. CIV. P. 23(g)(1)(C)(ii), and it may request information from the attorney regarding the representation and the fees involved. FED. R. CIV. P. 23(g)(1)(C)(iii).

[49] Hansberry v. Lee, 311 U.S. 32, 45 (1940).

[50] *Id.* at 42 (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235 (1897)).

[51] *Id.* at 42–43 (citing Plumb v. Goodnow's Adm'r, 123 U.S. 560, 561 (1887)). One of the leading civil procedure treatises noted:

> According to traditional notions, a member of the class in a Rule 23 suit is considered to be a party by representation, and will be bound to the same extent as an actual party. But in order to be deemed a party by representation, a class member must be *represented in such a way that his rights are protected.* Thus, an absent member of the class, even when he is specifically identified in the judgment, will not be bound if he can establish that to affect his rights would deprive him of property without due process of law, either because the class was inadequately represented or because of a failure to give him adequate notice. If the court finds that the member's due process rights were satisfied in the first proceeding, then he will be bound.

CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 1789 (3d ed. 2004) (emphasis added).

members have not been afforded due process of law and the earlier judgment cannot bind them.[52]

Both the California "hybrid" arbitration and the AAA Supplemental Rules try to incorporate these Rule 23 prerequisites in order to assure that class arbitrations proceed in a manner that is fair to both the individual participants and the unnamed class members. In the California "hybrid" arbitration, the presiding court makes all of the determinations regarding the certification and the appropriateness of class status, and the judge is bound to these rules of procedure regarding class status. The California courts have recognized that the procedural safeguards codified in Rule 23 are important even in the arbitral forum, and the California procedure requires that a judge safeguard these otherwise constitutional requirements for the class members.

The AAA rules also utilize the Rule 23 prerequisites for certification, but these rules require that the arbitrator, rather than the courts, determine whether or not certification is appropriate.[53] However, if either party is unsatisfied with the arbitrator's ruling, that party can appeal the decision to the local district court.[54] The AAA has also recognized the important safeguards present in Rule 23, and it uses this rule as a guide for the arbitrators to follow.

B. *Notice and Other Requirements for a "Damages" Class*

After the class meets the prerequisites mentioned above, a court would have to determine if a damages class is appropriate. In order to maintain a damages class, there must not only be commonality, but the common questions must also "predominate over any questions affecting only individual members, and . . . a class action [must be] superior to other available methods for the fair and efficient adjudication of the controversy."[55] The reason for the additional requirements in a class action for damages is to protect defendants from frivolous litigation.

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[52] The question of adequacy of representation can also be raised in a situation in which subclasses may be appropriate. If there are competing issues present within the class, subclasses may be necessary so that each subclass is adequately represented by a named representative. FED. R. CIV. P. 23(c)(4); *see also* Sternlight, *supra* note 18, at 33.

[53] *See infra* Part VI.C.

[54] *Id.*

[55] FED. R. CIV. P. 23(b)(3). In order to determine if there is such a predominance, the court can look at:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation

In addition to determining predominance, the court must notify all of the potential class members of the pending litigation.[56] Notice is mandatory in the damages class action,[57] so that all of the members are aware of the potential recovery, and so that the court knows to whom damages should be paid in the event of a recovery.[58] It must be the "best notice practicable under the circumstances," and all known individuals must be "identified through reasonable effort."[59] In many circumstances, the "best notice practicable" will be an advertisement in a newspaper, magazine, or other media outlet that will reasonably find potential class members. This is especially true for consumer class actions that affect people across the country. Any notice given must "state in plain . . . language" items such as the "nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires," that any class member can opt out of the class,[60] and that the judgment will be binding on all class members, including absent ones.[61]

Notice is not only required by Rule 23, but also mandated by the Constitution.[62] The Supreme Court noted that due process requires that each plaintiff receive "notice plus an opportunity to be heard and participate in the

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concerning the controversy already commenced by or against any members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

[56] FED. R. CIV. P. 23(c)(2)(B).

[57] FED. R. CIV. P. 23(c)(2)(A)–(B). This delineation makes sense for a number of reasons. In a (b)(1) action, presumably all of the affected parties are aware of the limited fund and already have notice of the class action. If the class is pursuing an injunction under a (b)(2) action, notice is not always required because if the class is successful, the injunction will benefit all and no money will have to be distributed.

[58] *See* 2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:17 (4th ed. 2002) (noting that courts are hesitant to certify Rule 23(b)(2) cases involving damages, in part because there is no strict notice requirement—an important part in any damages class action).

[59] FED. R. CIV. P. 23(c)(2)(B).

[60] Note that all Rule 23(b)(3) class members are *presumed* to be members of the class until they opt out. This type of class action is *not* an opt-in class. Notice is especially important under these circumstances because the class members are already members, and they can only exercise their ability to opt out *after* they receive notice under Rule 23(c)(2)(B).

[61] FED. R. CIV. P. 23(c)(2)(B).

[62] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811–12 (1985).

litigation, whether in person or through counsel.[63] The test for notice in class actions is the same test as notice of a suit under the landmark *Mullane v. Central Hanover Bank & Trust* case.[64] Notice must describe the litigation as well as the absent class members' right to participate.[65] Furthermore, due process requires "at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court."[66]

In a class-action arbitration, the arbitrator should take steps to protect the due process rights of the absent class members by providing them with notice that would satisfy the *Mullane* test. Notice should describe the class-action arbitration, and it should allow the individual members to opt out. Individual notice is, of course, best, but if the arbitrator cannot determine who all of the claimants are, then he or she should ensure that any published notice is likely to reach those affected by the proceedings. The AAA Supplemental Rules allow the arbitrator to approve and oversee the notice. These rules on notice are similar to the requirements in Rule 23, so it is clear that the AAA is attempting to protect arbitration participants by instituting a version of the Federal Rules. In contrast, the California "hybrid" procedure would have the presiding judge rule on notice issues. Under this approach, the participants are safeguarded by the rules of civil procedure because the judge is bound to follow them in making these determinations.

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[63] *Id.* at 812.

[64] *Id.* (holding that notice must be "reasonably calculated, under all the circumstances to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections") (quoting Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314–15 (1950)).

[65] See *Phillips Petroleum Co.*, 472 U.S. at 812.

[66] *Id.* The Court expanded its reasoning for allowing an "opt out" rule instead of an "opt in" rule:

> We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process. Requiring a plaintiff to affirmatively request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution. If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."

Id. at 812–13 (citations omitted).

What is common in the approaches of the AAA Supplemental Rules and the California "hybrid" procedure is that they both draw guidance from the requirements of Rule 23. Although arbitration is not a judicial procedure with the protections of the court or the Constitution, these two bodies have noted the importance of the Federal Rules in protecting both the named and unnamed parties in class arbitration. Although these two approaches differ on who makes the determinations of certification and notice, they both agree that some variation on the rules of civil procedure is necessary for a fair class arbitration.

Unfortunately, both of these procedures have their flaws, and neither one is available on a nationwide basis. The California approach has only been adopted in California, and the AAA rules are only in effect if the agreement to arbitrate incorporates them. For these reasons, it is essential for Congress to amend the FAA to provide uniform rules regarding class-action arbitration, and those new rules should incorporate aspects of Rule 23 in order to create a fair proceeding that protects both the named and unnamed class members.

IV. ARBITRATION AGREEMENT AND WAIVER

Although a plaintiff who proceeds in court through class-action litigation is entitled to the protections of due process, it is clear that a plaintiff has the right to waive a court procedure and due process protections.[67] The Supreme Court has not yet heard a case in which a class-action arbitration was challenged because a party's due process rights were in jeopardy in the ADR process. The *Bazzle* case did not address the question of waiver, but it did note that the plaintiffs signed an agreement that contained a waiver clause.[68] Any discussion of waiver in class-action arbitration, then, must be done by

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[67] Even Professor Sternlight, who opposes the use of class-action arbitration, acknowledges that it is possible for a person to waive due process rights if the waiver is express. Sternlight, *supra* note 18, at 117 ("[U]nless an arbitration clause expressly provided that persons who agreed to its terms were waiving their due process rights to be protected by a court in the event of a class action, the arbitration clause should not be interpreted to have such an effect.").

It is interesting to note that there is no federal or constitutional right to proceed by class action. The language of Rule 23 is permissive, not mandatory. The rule states that, "One or more members of a class *may* sue or be sued as representative parties in behalf of all," thus giving parties the right to proceed as a class, if they wish. FED. R. CIV. P. 23(a) (emphasis added). However, once a class action has been initiated in court, the class members are afforded the protections of Rule 23 and the Constitution.

[68] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 448 (2003).

analogy to waiver in other arbitration cases. The Supreme Court embraces two seemingly contradictory policies: to narrowly construe waivers of the right to a jury and to favor enforcement of arbitration clauses. Each of these policies will be discussed in turn.

First, the Supreme Court and the lower courts closely examine waivers of a jury trial. The right to a jury trial can only be waived "knowingly and voluntarily."[69] The reason that there is such a high burden to overcome is because the right to a jury trial is "justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealously."[70] Many people in a conflict expect that they can go to court in order to resolve a dispute, and the presence of an arbitration clause in a contract may surprise many disputants, especially consumers and employees. Thus, the Seventh Amendment right to a trial by jury must be waived only if it was made "knowingly and voluntarily."

Although the standard for a waiver of a jury trial is high, once a disputant has waived his or her rights, arbitration will be enforced under Section 4 of the FAA.[71] Additionally, the Supreme Court has noted that there is a policy "favoring arbitration,"[72] so effective waivers will be enforced and the parties will be sent to arbitration. Provided that there is no clear mandate by Congress that a particular claim cannot be subject to arbitration, an arbitration clause will be enforced in court.[73] The Court in *Gilmer v. Interstate/Johnson Lane Corp.*, though, added one limitation on the availability of arbitration: The litigant must be able to effectively "vindicate [his or her] statutory cause of action in the arbitral forum."[74] Thus, *Gilmer*

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[69] *See* Fuentes v. Shevin, 407 U.S. 67, 94 n.31 (1972) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

[70] Jean R. Sternlight, *Protecting Franchisees from Abusive Arbitration Clauses*, 20 FALL FRANCHISE L.J. 45, 48 (2000) (citing Teamsters Local No. 391 v. Terry, 494 U.S. 558, 581 (1990)).

[71] 9 U.S.C. § 4 (2000) (stating that arbitration agreements can be enforced according to their terms in any federal court).

[72] This mantra was first stated in *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983), and it has been repeated in most of the Supreme Court's landmark arbitration cases. *See, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002); E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 289 (2002); Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79, 91 (2000).

[73] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

[74] *Id.* at 28 (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637). The *Gilmer* case involved a claim of age discrimination under the ADEA.

held that individuals can waive their constitutional right to a jury trial, even when a plaintiff is given a statutory cause of action.

Even though the participants of class arbitration have likely waived their right to a jury trial and to the Rule 23 and constitutional protections associated with certification and distribution of notice, the law of class action litigation is still useful for a discussion of class action arbitration. Class arbitration is a new procedure, and to date there have been few guidelines on how to proceed. Using the well-recognized and highly regarded law of class litigation as a model for class arbitration will help protect all of the participants in class arbitration.

V. ASPECTS OF ARBITRATION DETRIMENTAL TO A CLASS PROCEDURE

Although the class disputants have waived their right to be in court, the arbitration process should still be fair and protect the absent class members. This part will discuss certain problems that may arise because of the few restrictions on who can be an arbitrator, limited judicial review under the FAA, the necessity of confidentiality, and the effects of expedited procedures.

A. *Problems Relating to the Arbitrator*

There are no requirements on who can or cannot be an arbitrator.[75] Unlike lawyers, arbitrators are not licensed by the state. In fact, many arbitrators are non-lawyers, especially those specializing in labor and employment disputes.[76] Although arbitral providers, such as the AAA, can place qualifications on who can be on their rosters,[77] an arbitrator does not

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[75] *See* Nicole Buonocore, *Resurrecting a Dead Horse—Arbitrator Certification as a Means to Achieve Diversity*, 76 U. DET. MERCY L. REV. 483, 484 (1999) ("Arbitration is often called a 'profession.' Yet none of the traditional characteristics associated with a profession, such as schooling in a particular field, testing, and licensing, apply to the arbitration profession.").

[76] *See, e.g.*, Shalu Tandon Buckley, Note, *Practical Concerns Regarding the Arbitration of Statutory Employment Claims: Questions that Remain Unanswered After* Gilmer *and Some Suggested Answers*, 11 OHIO ST. J. ON DISP. RESOL. 149, 174 (1996) (noting that many highly qualified arbitrators are not members of the bar, but they are keen minds with experience in the labor and employment industry).

[77] For example, the ADR provider JAMS only hires retired judges and attorneys to serve as neutrals for their organization. *See JAMS: The Resolution Experts*, *at* http://www.jamsadr.com/who_we_are.asp. These types of requirements help shield the

have to be associated with an arbitral provider organization in order to be the decisionmaker in a case if both parties agree to the appointment. Any person with a shingle and an advertisement can begin work as an arbitrator, so long as they follow the applicable ethical guidelines and they can find work.[78] One way to ensure that the arbitrator is qualified to hear a class-action case would be either certify or license arbitrators. But this idea has not proven popular.[79]

Arbitrators are not required to follow the law when making their decisions.[80] One of the "benefits" of arbitration is that an arbitrator is allowed to consider the equities of a case, even if those equities are contradictory to the law.[81] Because of this longstanding perception of

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dispute resolution providers from hiring and assuming liability for neutrals that have little to no expertise.

[78] In reality, most arbitrators are people well recognized in the industry, and it is relatively hard to break into the arbitrator circles. The group of available arbitrators is a closely-knit group of men, and the fact that there are few women and minority arbitrators has caused a bit of a stir in the ADR world. *See* Buonocore, *supra* note 75, at 483; Meghan L. Dunphy, Comment, *Mandatory Arbitration: Stripping Securities Industry Employees of Their Civil Rights*, 44 CATH. U. L. REV. 1169, 1195 (1995) (noting that most arbitrators become arbitrators because they know someone who is currently an arbitrator) (citing Mario F. Bognanno & Clifford E. Smith, *The Demographic and Professional Characteristics of Arbitrators in North America*, 41 NAT'L ACAD. OF ARB. PROC. 266, 273–75 (1989) (statistics on arbitrators)).

Despite the fact that it is not particularly easy to become an arbitrator that will actually generate business, the state of the law remains that anyone can pick up the practice and perhaps get lucky and find some clients. The purpose of this part is to point out that there are currently no restrictions on the practice of being an arbitrator.

[79] *See* Buonocore, *supra* note 75, at 495–99.

[80] *See, e.g.*, Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 111 (2002) ("Because courts do not require that arbitrators apply correct substantive legal rules to a dispute, equity-based arbitration results are typical.") (footnote omitted); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 118 (1997) (noting that provider organizations such as the AAA do not place much emphasis on the role of substantive law and often encourage arbitrators to craft awards based on the equity); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 719–20 (1999) (noting that up to 90% of arbitrators would disregard the law in order to reach an equitable result in a case).

[81] *See, e.g.*, Brunet, *supra* note 80, at 110–12 ("Traditionally, arbitrators were seldom lawyers but were fellow merchants in the same business as the disputants and were selected because of the expectation that they would decide using industry custom and usage norms."); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and*

arbitration, there may be a worry that arbitrators that do not understand the complexities of class action law may, instead, turn to the equities of the case and decide procedural issues on those grounds.[82]

If an arbitrator cannot effectively handle these issues of law and policy, extensive judicial supervision will be necessary in order to effectively safeguard the due process rights of the unnamed parties.[83] The "hybrid" version of class arbitration in California solves this problem by allowing the judge to make the determinations of certification and notice. The judge could also be asked to make other determinations specific to each given case if the arbitrator is unable to handle the situation. The relationship, then, between the arbitrator and the court might become complex, and the case would move back and forth between the arbitrator and the judge, increasing the time and cost of the procedure.

The "hybrid" approach, however, appears to dramatically underestimate the ability of an arbitrator to become educated in the issue of class action law and to follow it. If the pool of potential arbitrators can be limited to those with legal or judicial training, the potential arbitrators should be well-equipped to read Supreme Court precedent and follow it with little difficulty. Provided that lawmakers can articulate what type of person can successfully protect the absent class members, this arbitrator should be trusted to act in accordance with class action law.

Confidentiality, 76 IND. L.J. 591, 594 (2001) (stating that, because of ADR confidentiality, neutrals do not necessarily have to follow the law).

[82] One example of this criticism may be that an arbitrator would not be able to recognize what qualifies as notice satisfying the *Mullane* test. An arbitrator may not know that it should follow *Mullane*, or an arbitrator may be unclear as to what *Mullane* requires. If the arbitrator is unclear as to what effective notice should look like, the arbitrator may just issue notice that appears to be equitable, even if it would not satisfy the *Mullane* standard.

[83] *See* Androski, *supra* note 18, at 645 ("[C]lass certification, notice requirements, and designation of an appropriate class representative involve complicated legal questions on which arbitrators may be more likely than judges to commit error.") (footnote omitted); Sternlight, *supra* note 18, at 52–53; C. Evan Stewart, *Are Class Actions Appropriate in Arbitrations?*, N.Y. L.J., June 13, 1991, at 6 ("The court's role at the certification stage cannot suddenly be stopped; it must carry on to such stages as notice, settlement, protection of class members, etc. It is inconceivable to believe that non-Article III arbitrators could properly oversee, for example, the notice procedures mandated by the Supreme Court.") (footnote omitted).

B. *Limited Judicial Review Under the Federal Arbitration Act*

Another common criticism of arbitration is that the arbitrator's decision is subject to a limited judicial review. Under the FAA, an arbitrator's decision can only be reviewed in the event of misconduct, fraud, bias on the part of the arbitrator, or if the arbitrator acted outside of the powers given to him or her as defined in the arbitration agreement.[84] Any potential problems with the capability of the arbitrator are exacerbated by the fact that any mistakes made during the hearing will be binding on the parties in the absence of fraud or misconduct. Furthermore, under the FAA, the arbitral award can only be appealed after the process is over,[85] but in court, a disappointed party can move for an interlocutory appeal after the certification is complete.

Although this is a serious concern for class-action arbitration, it is worth noting that the judicial review employed by courts is also limited. If a district court denies certification, this is only reviewable on an abuse of discretion standard.[86] Appellate courts also employ an abuse of discretion standard when reviewing the lower courts' decisions on the notice employed in the class action.[87] Although appellate review for class litigation is broader than judicial review of an arbitrator's decision, the review is still quite limited in both instances.

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[84] 9 U.S.C. § 10(a) (2000). An award may be modified, rather than vacated, if there is a miscalculation in the award or if the award has other problems not relating to the merits of the case. *Id.* § 11.

[85] *See id.* § 10. The AAA Supplemental Rules create an opportunity for a procedure similar to the interlocutory appeal in the federal courts. The AAA Rules allow either party to appeal to the district court the arbitrator's ruling on certification. *See infra* Part VI.C. Although this procedure makes class arbitration more similar to class litigation, it may turn class arbitration into an overly burdensome process. Furthermore, it is unclear what standard of review the court should employ when making this judicial review.

[86] *See, e.g.*, Murray v. U.S. Bank Nat'l Ass'n, 365 F.3d 1284, 1287 (11th Cir. 2004); Similow v. S.W. Bell Mobile Sys., Inc., 323 F.3d 32, 37 (1st Cir. 2003); Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1271 (11th Cir. 2001); Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1169–70 (3rd Cir. 1987); Jenkins v. Raymark Indus., 782 F.2d 468, 471–72 (5th Cir. 1986).

[87] *See, e.g.*, *In re* Diet Drugs, 2004 WL 326971, at *342 (3d Cir. 2004); Cruz v. American Airlines, Inc., 356 F.3d 320, 328 (D.C. Cir. 2004) ("The district court's decision not to order notice to the class is also a matter within the court's 'discretion,' and so we will also reverse that only if the decision was an abuse of discretion.") (citation omitted).

C. *Confidentiality—the Double-Edged Sword*

Confidentiality is usually heralded as the biggest advantage of choosing an ADR procedure, including arbitration, over litigation.[88] Under the cover of confidentiality, the parties should feel free to disclose information in the procedure knowing that the information will not be used against them in a subsequent proceeding.[89] The Revised Uniform Arbitration Act, meant as a model law for states to adopt, precludes the arbitrator from testifying in a subsequent proceeding by declaring that the arbitrator is an incompetent witness.[90] Many parties would probably refuse to attend arbitration if they knew that their documents and statements could be submitted to a court or even a newspaper. So, in many ways, confidentiality is essential to any ADR procedure.

Broad confidentiality provisions, however, may appear to preclude notice from being disseminated to absent parties, especially if the notice takes the form of publication. For notice to be constitutional under *Mullane* and *Shutts*, it must reveal the named parties, the nature of the action, the option for an absent class member to opt out, and a rough timetable as to when she has to exercise such an option.[91] However, revealing this information potentially

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[88] *See, e.g.*, Robert J. Lewton, *Are Mandatory Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1028 (1996) (noting that employers choose arbitration, in part, to have a confidential dispute resolution procedure).

[89] Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1778 (2001) (finding that confidentiality is common in ADR processes in order to make the disputants feel more comfortable and secure with the process); Weston, *supra* note 81, at 594 (the promise of confidentiality helps encourage candor in discussions and presentations of evidence).

[90] REVISED UNIFORM ARBITRATION ACT § 14(d), *reprinted in* GOLDBERG ET AL., *supra* note 2, at 633. This section states:

> In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify, and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding, to the same extent a judge of a court of this State acting in a judicial capacity.

Id.

[91] The Supreme Court did not explicitly state what would have to be in the notice, other than it would have to satisfy *Mullane*, but it did state that the notice given in the *Phillips Petroleum Co.* case was sufficient. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812–13 (1985). The notice in *Phillips Petroleum Co.* included a description of the proceedings, the names of the representatives and their counsel, as well as the ability to

breaches confidentiality. Plaintiffs and defendants who chose arbitration in order to stay out of the press may be disappointed if the media learns of the case because of the dispensation of notice to absent class members.

The right to confidentiality of named class members must be balanced against the right to notice for unnamed class members. For obvious reasons, the rights of the absent class members should prevail in this situation. The notice would have to disclose certain information, such as the names of the parties, a general description of the claim, and perhaps some outline or timetable for the expected procedures. This is a limited disclosure that must be tolerated by the named parties. Unlike class-action litigation, the briefs, rulings, motions, hearings, and most other statements could still be confidential and not part of the public record.

Confidentiality may come up in one other respect: review of a final decision by the arbitrator. As noted above, the arbitration should be subject to review greater than FAA § 10 review, and the challenging party will have to submit evidence to the judge in order to show why the arbitrator incorrectly decided the case. A judge would probably view a transcript as the best available evidence of an abuse of discretion. Transcripts have been entered into evidence in judicial review of arbitration rulings and mediation settlements,[92] and it is unclear how the rules of confidentiality apply in these cases. Currently, evidence of misconduct by third-party neutrals can be admitted, despite confidentiality concerns,[93] and this exception would have to be extended in order to challenge an arbitrator's ruling in a class action. If due process requires that there is expanded review, then the review must be meaningful, and meaningful review will have to give way to confidentiality.

Thus, class-action arbitration law will have to be amended in two respects regarding confidentiality. First, it will have to allow notice to reach

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opt out of the litigation in order to pursue a different claim against the same defendants. *Id.*

[92] *See, e.g.*, Local Union 15 v. Exelon, 2004 WL 769431, *1 (N.D. Ill. 2004) (over 2,400 pages of arbitration transcript were entered into evidence); New England Homes, Inc. v. R.J. Guarnaccia Irrevocable Trust, 846 A.2d 502, 506 (N.H. 2004) (reviewing the arbitration transcript and determining that the award rendered in arbitration was not supported by evidence); International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of U.S. and Canada Local No. 16 v. Laughon, 12 Cal. Rptr. 3d 522, 524 (Cal. Ct. App. 2004) (district court based its finding of no "obvious bias or prejudice" of the arbitrator on an examination of the arbitration transcript); Cooper v. Maytag, Co., 2004 WL 573663, *1 (Iowa Ct. App. 2004) (plaintiff submitted the transcript from a workman's compensation arbitration as evidence).

[93] *See* REVISED UNIFORM ARBITRATION ACT § 14, *reprinted in* GOLDBERG ET AL., *supra* note 2, at 633 (stating that an arbitrator can introduce evidence into a trial in which the arbitrator has been sued for professional malpractice).

all potential class members, even if that requires publication of the notice containing a description of the action. Second, the confidentiality rules will have to contain an exception for challenges of awards in open court. Without this second exception, awards will be final and binding in almost all circumstances.

D. *Expedited Procedures*

The final aspect of arbitration that may hinder the due process rights of unnamed class members is the general informality and expedited nature of arbitration in comparison to litigation. As with the other characteristics of arbitration mentioned above, the informal nature of arbitration is one of the procedure's attractive features.[94] Parties elect to go to arbitration in order to save time and money. However, if the procedures employed by the parties and the arbitrator become too abbreviated, they might deprive the participants of their due process rights associated with having a day in court and being adequately represented.

The Supreme Court has not explicitly stated what procedures are due absent class members, other than adequate notice and representation. The Court has not addressed issues such as numbers of witnesses or appropriate discovery because the court system guarantees each party the right to extensive discovery and the right to proceed in a manner to best suit each side. An arbitrator, however, may wish to limit the number of witnesses called or the amount of time it would take for discovery.[95] In this respect, the

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[94] Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2243–44 (1993) (stating that informalities best help resolve disputes between persons who are apt to settle); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366–67 (1985) (noting that informalities of ADR processes allow participants to feel more comfortable in resolving their disputes); Ronald T.Y. Moon, *Visions of a New Legal System: Could There Be a Legal System That Better Incorporates the Strengths of ADR and Existing Legal Institutions?*, 15 REV. LITIG. 475, 481–82 (1996) (finding that informalities of ADR are likely to increase participation in the ADR process).

[95] *See* Jason F. Darnall & Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. DISP. RESOL. 321, 335–36 (2001) (arguing that arbitrators should have more discretion in determining what discovery is necessary and relevant in a given case); Wendy Ho, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 218–19 (1997) (stating that there are few rules regarding arbitrators and discovery, so each arbitrator sets his or her own rules in each arbitration); Monica Petraglia McCabe, *Arbitral Discovery and the Iran-United States Claims Tribunal Experience*, 20 INT'L LAW. 499, 504–05

absent class members may not be adequately represented by the named parties if the named parties do not have sufficient time or resources to present a compelling case.

Perhaps the easiest way to address this problem is through a more liberal judicial review.[96] The challenging parties can show that the arbitrator acted improperly when determining how to structure the process so that a legitimate case could be made on each side. The biggest consequence to addressing these concerns through judicial review is that the problem would be addressed on the back-end, rather than when the problem is occurring. Another option would be that class members could opt out of the arbitration if they view the procedure as ineffective. Because judicial review and the ability to opt out can remedy most of these miscellaneous procedure problems, additional rules regarding discovery and the hearing procedure may not be necessary. However, Congress and individual states should keep these concerns in mind when determining the best procedures in class-action arbitration.

VI. CLASS ARBITRATION PROCEDURES TO PROTECT DUE PROCESS

As noted above, general arbitration rules potentially deprive the unnamed class members of the due process rights that they would receive under litigation in the federal courts. Although these class members, by virtue of signing identical arbitration clauses, may have waived their rights to a trial and to due process guarantees, the rules and regulations surrounding class action arbitrations should be reviewed in light of these due process concerns. This section will examine three reforms, two of which are already in practice, and one of which is a potential reform. This article, however, advances none of these approaches, but instead advocates for a completely new approach that attempts to utilize the best features of these procedures in a more efficient format.

A. *An Extension of the Revised Uniform Arbitration Act Provision on Consolidation*

The first way to regulate class-action arbitration would be to apply rules similar to those of consolidation to the process.[97] A consolidation is a

(1986) (finding that agreements to arbitrate can expressly limit discovery; otherwise, the arbitrator will have to make these determinations).

[96] *See supra* Part IV.B.

[97] The RUAA and several states already have consolidation provisions. REVISED UNIFORM ARBITRATION ACT § 10, *reprinted in* GOLDBERG ET AL., *supra* note 90, at 631;

procedure in which similarly situated plaintiffs (or potentially defendants) join their claims together into one action.[98] In this action, all of the affected parties to a dispute are sitting around the same proverbial "table"; conversely, in a class action, there are absent members. If a consolidation can work in order to resolve multiple claims in one proceeding, extending it to class-action arbitration could also potentially resolve class action claims.

The Revised Uniform Arbitration Act (RUAA) was promulgated in 2000, and it includes a section on consolidation. This section was added in order to give courts and parties a more efficient way to deal with similar claims.[99] The procedure set forth by the RUAA requires the courts—not the arbitrators—to consolidate similar claims, but only if one or both of the parties submits a motion to the court.[100] The Act sets forth four factors for a court to consider before consolidating arbitration claims: (1) whether all of the parties are bound by the same arbitration agreement; (2) whether the claims arise from similar circumstances; (3) whether there exists a "common issue of law or fact"; and (4) whether consolidation would unfairly prejudice those opposing the consolidation.[101] Furthermore, the courts would have discretion to order consolidation as to some issues and leave other issues for

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see also CAL. CIV. PRO. CODE § 1281.3 (West 1982); CAL. CIV. PRO. CODE § 1297.272 (West Supp. 2004); FLA. STAT. ANN. § 684.12 (West 2003); GUAM CODE ANN. § 10111 (1997) (consolidation of medical malpractice claims); HAW. REV. STAT. § 658A-10 (Supp. 2003); LA. REV. STAT. ANN. § 38:2314.1 (West 1989); MASS. ANN. LAWS 251 § 2A (Law. Co-op. 1992); NEV. REV. STAT. ANN. § 38.224 (Michie 2002); N.J. STAT. ANN. § 2A:23B-10 (West Supp. 2004); N.M. STAT. ANN. § 44-7A-11 (Michie 2004); N.Y. C.P.L.R. § 7556 (McKinney 1998); N.C. GEN. STAT. § 1-567.57 (1999); N.D. CENT. CODE § 32-29.3-10 (Supp. 2003); OHIO REV. CODE ANN. § 2712.52 (Anderson 2000); OR. REV. STAT. § 36.506 (Supp. 1998); PA. STAT. ANN. § 1102 (West 2004); TX. CIV. PRACT. & REM. CODE ANN. § 172.173 (Vernon 2004); UTAH CODE ANN. § 78-31a-111 (2003).

[98] Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 12–13 (2001) (noting that the use of consolidation can be used in order to keep many cases involving "common issues of law or fact [to] be resolved in multiple fora").

[99] REVISED UNIFORM ARBITRATION ACT pmbl., *reprinted in* GOLDBERG ET AL., *supra* note 90, at 624 ("[T]he underlying reason many parties choose arbitration is the relative speed, lower cost, and greater efficiency of the process. The law should take these factors, where applicable, into account. For example, section 10 allows consolidation of issues involving multiple parties.").

[100] *Id.* § 10(a), at 631 (stating that consolidation is possible "upon [motion] of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims") (alteration original).

[101] *Id.* § 10(a)(1)–(4).

separate arbitrations.[102] The court, however, cannot order a consolidated arbitration if the agreement prohibits consolidation.[103]

Because there is already a framework for consolidating arbitrations, it would be possible to extend this procedure to class-action arbitrations, even though RUAA § 10 does not explicitly extend to them.[104] In *Keating v. Superior Court*,[105] the California Supreme Court analogized consolidations and class actions.[106] This 1982 Court noted that there was no direct authority on the issue of class action arbitrations, but it found that:

> Analogous authority exists, however, with respect to the consolidation of arbitration proceedings involving a dispute which concerns several parties each of whom has an agreement with one or more of the others to arbitrate the dispute. "Although the [Federal Arbitration] Act does not specifically provide for consolidated arbitrations, courts have frequently ordered consolidated arbitration proceedings when the 'interests of justice' so require, either because the issues in dispute are substantially the same and/or because a substantial right might be prejudiced if separate arbitration proceedings are conducted."[107]

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[102] *Id.* § 10(b) ("The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.").

[103] *Id.* § 10(c) ("The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation."). This outcome is consistent with the Federal Arbitration Act. 9 U.S.C. § 4 (2000). Under the FAA, a court can only enforce an arbitration agreement according to its terms. If the terms expressly prohibit consolidation, then a court cannot consolidate under either the FAA or the RUAA.

The RUAA does not address the issue of an arbitration agreement that is silent on the issue of consolidation. The wording of § 10(c) suggests that a court is only prohibited from ordering consolidation in cases in which the agreement expressly prohibits consolidation. Therefore, a court could consolidate arbitrations if the agreement is silent. Because the RUAA has not been widely adopted, this is an issue that has not yet arisen.

[104] *See* REVISED UNIFORM ARBITRATION ACT § 10, *reprinted in* GOLDBERG ET AL., *supra* note 90, at 631. One commentator noted that the issue of class-action arbitration was "hotly debated," and because of this the Drafting Committee could reach "no conclusion about class-action arbitration" and that § 10 was not meant to cover class-action arbitrations. Heinsz, *supra* note 98, at 15–16.

[105] Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982).

[106] *Id.* at 1208.

[107] *Id.* (citing *In re* Czarnikow-Rionda Co., Inc., 512 F. Supp. 1308, 1309 (S.D.N.Y. 1981)).

Although the *Keating* Court ordered a "hybrid" version of classwide arbitration, this case notes that courts may be willing to extend consolidation to class-action arbitrations.

Extending consolidation to class-action arbitrations may be an easy way to promote them; however, this procedure is flawed for a number of reasons. First, the limited requirements in RUAA § 10(a) are not guaranteed—or even likely—to protect the absent class members' due process rights. This section does not even contemplate notice or adequacy of representation, the most important due process requirements in class actions. Second, the process requires that the court, rather than an arbitrator, order the consolidation or class action. According to the *Bazzle* Court, the arbitrator makes the initial inquiry as to whether a consolidation or class action is permissible under the contract.[108] So, the arbitrator must first decide whether the procedure is permissible, and then the case would have to be sent up to the court for the consolidation. This creates an impracticable and time-consuming shuffling between the arbitrator and the courts. Third, the review provisions under the FAA would still apply.[109] Review, then, would be limited to the narrow grounds stated in § 10.[110] For these reasons, simply extending consolidation to class-action arbitration would not be the best solution to preserve the due process rights of absent class members.

B. *The California "Hybrid" Procedure*

California has designed a "hybrid" procedure for class-action arbitrations in which the courts have the power to oversee and rule on virtually all matters of law. This form of arbitration is cumbersome, but it is designed this way to protect the absent class members, especially when the arbitration agreements are present in contracts of adhesion.

The *Keating* Court was the first court to order hybrid arbitration. The case involved a contract of adhesion between franchisors and franchisees.[111]

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[108] *See supra* Part II.

[109] The Supreme Court has been clear that any state laws that are in contravention to the FAA are preempted by the FAA. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967).

[110] *See supra* Part V.B.

[111] *Keating*, 645 P.2d at 1195–96. All of the franchise agreements were for the company 7-Eleven, and the franchisees were described as generally powerless to change particular provisions in their contracts, including the arbitration agreements.

The court ordered a classwide arbitration, but it noted that the district court would have to be heavily involved in the procedure.[112] The court stated:

> Without doubt a judicially ordered classwide arbitration would entail a greater degree of judicial involvement than is normally associated with arbitration, ideally "a complete proceeding, without resort to court facilities." The court would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation and in the event of dismissal or settlement. A good deal of care, and ingenuity, would be required to avoid judicial intrusion upon the merits of the dispute, or upon the conduct of the proceedings themselves and to minimize complexity, costs, or delay.[113]

This court specifically noted that a court would have to protect the due process rights of absent class members by ordering certification, notice, adequacy of representation, and other aspects of a class action. Furthermore, the court stated that it would be possible, albeit difficult, for a court to allow the arbitrator to rule on the merits without interfering too much.

Because the class action arbitrations that have occurred to date in California are confidential procedures, it is unclear exactly how the hybrid procedure takes place. The only thing that is clear from the *Keating* case is that the court is heavily involved in the proceeding and that the arbitrator is supposed to determine the merits of the case.

In the wake of *Bazzle*, however, it is unclear whether the court or the arbitrator is supposed to certify the class action. The holding of *Bazzle* is limited to the question of arbitrability, but the issue of certification is so closely related to arbitrability that it is not inconceivable that *Bazzle*'s holding could be extended to certification and beyond. But even if *Bazzle* is limited to the issue of arbitrability, the hybrid arbitration is a cumbersome procedure. In the wake of *Bazzle*, a typical classwide arbitration would first start with the arbitrability question determined by the arbitrator.[114] Then, the parties would have to appear before a court for certification and dissemination of notice. Then, the merits of the case would be heard by the

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[112] *Id.* at 1209.

[113] *Id.* (citations omitted).

[114] California courts are now referring cases back to arbitrators to make the initial arbitrability determination. *See* Yuen v. Superior Court, 121 Cal. App. 4th 1133, 1135 (Cal. Ct. App. 2004); Omar v. Ralphs Grocery Co., 118 Cal. App. 4th 955, 960 (Cal. Ct. App. 2004).

arbitrator, but if a question of adequacy of representation were to arise, the case would go back up to the court and then back down to the arbitrator. The courts in California would probably also entertain other issues and motions brought before it during the arbitration. This hypothetical case serves to demonstrate that the procedure benefits little from the otherwise streamlined arbitration process.

Yet, despite all of the judicial intervention, the California hybrid procedure appears to satisfy the due process rights of the absent class members. The court would rule on the notice, certification, and adequacy of representation issues, thus alleviating any fears that an arbitrator is unable to handle these issues. Furthermore, because the court rules on these crucial issues, the problem of judicial review of constitutional issues is probably not as big a concern as if the arbitrator made these decisions.

Although the due process rights of absent class members are protected under the hybrid arbitration, this system is still inadequate because of the cumbersome relationship between the courts and the arbitrators. The hybrid system assumes that the courts are better equipped to follow the law, and this is why the court must interfere in the case to such a high degree. If there were more stringent qualifications on who could be an arbitrator in a class action claim, then the arbitrator may be able to handle more of the case without so much supervision. Another potential drawback to the hybrid system is that it is a judicially created doctrine that could evolve differently in different states. A more satisfactory method of creating a system of class action arbitration would be a uniform state law or an amendment to the FAA.

C. *Class-Action Arbitration Under the AAA Rules*

Following the *Bazzle* decision, the AAA created Supplemental Rules for Class Action Arbitrations.[115] In order to carry out these new rules, the AAA has established a special panel of class-action arbitrators, and at least one

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[115] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 1(a) (2003) ("These Supplementary Rules for Class Arbitrations shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association where a party submits a dispute to arbitration on behalf of or against a class or purported class . . . ."). The Supplemental Rules are meant to work in conjunction with the other rules in place for arbitrations under the AAA. *Id.*

arbitrator from this list will be appointed to any arbitration proceeding under these rules.[116]

These new Supplementary Rules attempt to incorporate both the *Bazzle* ruling and the elements of Rule 23. The Rules explicitly note that the arbitrator is to make the initial arbitrability question, thus satisfying the rule in *Bazzle*.[117] They require that the arbitrator make this initial determination within thirty days, and that the arbitrator can proceed with the class action if none of the parties seek judicial review of this decision.[118] If none of the parties seek review, or if the judicial ruling allows the arbitrator to proceed with the class action, the arbitrator, then, must determine whether or not to certify the class.[119]

When determining whether a class action is appropriate, the arbitrator must first determine if the prerequisites to a class action have been satisfied.[120] The first five prerequisites are familiar: (1) numerosity of claimants, (2) commonality of an issue of law or fact, (3) typicality of the representative plaintiff's claim, (4) the representative parties who would adequately represent the interests of the class, and (5) the class counsel who adequately represents the interests of the entire class.[121] The AAA Rules contain an additional requirement—that "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members."[122] If all of these prerequisites are satisfied, the arbitrator can then determine if a class is maintainable.

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[116] *Id.* § 2(a) ("In any arbitration conducted pursuant to these Supplementary Rules, at least one of the arbitrators shall be appointed from the AAA's national roster of class arbitration arbitrators.").

[117] *Id.* § 3 ("[T]he arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.").

[118] *Id.*

[119] *Id.* §§ 3, 4.

[120] *Id.* § 4. This is one example of how the new AAA rules are attempting to follow Rule 23 closely. The AAA rules and Rule 23 each use the word "prerequisite" to describe the initial determination of appropriateness for class status. *See* FED. R. CIV. P. 23(a).

[121] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 4; *see also supra* Part III for a discussion of these requirements in a federal class action.

[122] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 4(a)(6). In some ways, this additional requirement may be superfluous. If some class members had signed an agreement and others had not, then the arbitration presumably could not be binding on them anyway. Also, if the parties to an arbitration

In order to determine if the class action is maintainable, the arbitrator has to, essentially, determine if the common issues of law and fact "predominate" over otherwise individual questions.[123] To determine whether or not there are predominating issues, the arbitrator can consider the following: (1) whether there are individuals who would rather proceed separately; (2) whether other proceeds have already been initiated by other class members; (3) whether all of the claims can be combined in one forum; and (4) whether there will be difficulties in managing the class.[124] The purpose of these provisions is to determine if a class procedure is the best procedure or whether separate arbitrations would best serve the interests of the justice and the parties.

If the arbitrator decides that a class-action arbitration is appropriate, then the arbitrator must, in writing, address all of the prerequisites and predominance issues in a reasoned award.[125] This award should also contain the names of the class representatives, their counsel, a description of the certified class, a description of the claims and issues, and a description of how notice will be distributed to absent class members.[126] After an arbitrator certifies the class, the proceeding must be stayed for a period of thirty days for any party to seek judicial review of this determination.[127] Once the thirty-day limitation is over and no one has sought review, or once a court instructs the arbitrator to continue with the case, the arbitrator can proceed.[128]

After an arbitrator certifies the class, the arbitrator then must oversee the process of notifying the absent class members of the arbitration.[129] The

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agreement had signed substantially different agreements, then the claim of the representative plaintiff may no longer be typical of that of the rest of the class. Although this provision may not be necessary, it does serve as a reminder to the arbitrator to be assured that all of the claimants have signed similar agreements.

[123] *Id.* § 4(b). This section requires that:

> An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied, and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.

Id.; *see supra* Part III for a discussion of the parallel provisions in Rule 23.

[124] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 4(b)(1–4).

[125] *Id.* § 5(a).

[126] *Id.* § 5(b).

[127] *Id.* § 5(d).

[128] *Id.*

[129] *Id.* § 6(a).

notice must be the "best notice practicable under the circumstances."[130] The notice, too, must be "given to all members who can be identified through a reasonable effort."[131] Direct notice, then, would be best, but notice by publication should be sufficient if it is impossible to know the identities of the class members. The notice must state the following in a clear and concise manner: (1) the "nature of the action," (2) the definition of the certified class, (3) the "class claims, issues, or defenses," (4) that any member may participate in the claim, (5) that the arbitrator will exclude from the class members who have opted out, (6) that the class judgment will be binding on absent class members, (7) biographical information on the arbitrator and that the arbitrator has been approved to hear the claim, and (8) instructions as to how a class member can access information about the action.[132]

The arbitrator, then, must schedule hearings and ultimately make a determination on the merits of the case.[133] The award must be in writing, and it must be reasoned.[134] The award must also define the class and state who received notice of the proceedings.[135] These rules do not make specific provisions for post-award judicial review, but this is clearly allowed under the FAA.[136]

The AAA Rules explicitly reject the presumption of confidentiality in class action arbitrations.[137] The arbitrator must allow class members to participate or attend hearings, but the arbitrator can elect to make the hearings and filings available to the general public.[138] Futhermore, the AAA will maintain on its website the "Class Arbitration Docket" which will contain information relating to class arbitrations, including the names of the parties and counsel in class arbitrations, lists of awards rendered by given arbitrators, and a schedule of known hearings.[139] These confidentiality

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[130] *Id.* This notice requirement is modeled after the *Mullane* test. It appears that the drafters are attempting to provide notice to the absent class members in a manner which would not compromise their rights to due process if the case had proceeded through litigation.

[131] *Id.*

[132] *Id.* § 6(b)(1–8).

[133] *Id.* § 7.

[134] *Id.* § 10.

[135] *Id.* § 7.

[136] 9 U.S.C. § 10 (2000).

[137] AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 9(a).

[138] *Id.*

[139] *Id.* § 9(b).

rules—or lack of confidentiality rules—make class arbitrations more similar to class litigation. Although the proceedings may no longer be confidential, they will become more transparent, and this will help protect all of the parties involved.

These new class action rules attempt to protect the due process rights of absent class members. The rules embody principles set forth by the Supreme Court and principles found in the Federal Rules. Yet, despite these advances in protection for the absent class members, there are still three significant flaws in this resolution to the problems surrounding class action arbitrations.

First, the AAA Rules allow for judicial review at three distinct times without considering that judicial review would have to be conducted according to the FAA. The FAA rules on judicial review, as noted above,[140] are a limited remedy for unsatisfied litigants. Because FAA review can only lead to a vacatur of an award for misconduct or bias,[141] and because these are very difficult claims to prove, the review may be practically meaningless. The problems of arbitrator distrust and irreversible arbitration awards will still be present if the AAA Rules remain unchanged.

Second, the fact that the process allows for judicial review on three occasions could significantly slow down the class action arbitration. Furthermore, the possibility of appealing the decisions of the arbitrator to a court on three occasions has the potential to raise the cost of arbitration exponentially. The underlying reason for these extensive opportunities for judicial review can only be mistrust of the arbitrators and the availability of limited review. However, parties may not be willing to proceed under the AAA rules if the procedure has the potential to become so burdensome.

The final problem with the AAA rules is that these are rules adopted by one organization, and they are only applicable if the parties chose to proceed under these rules. If the parties contract to submit their claims under the rules of a different provider organization, or no provider organization at all, then the class members will not have these protections.[142] While the AAA should be commended for quickly creating rules to deal with *Bazzle* and Rule 23, a uniform state law or a revision to the FAA would better address these concerns on a more consistent, national basis.

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[140] *See supra* Part V.B.

[141] 9 U.S.C. § 10.

[142] Currently, only the AAA has rules regarding class action arbitrations. The other arbitration provider organizations have either not yet addressed this issue or have not been able to satisfactorily resolve the issue.

VII. A NEW APPROACH: INCREASING THE AUTHORITY OF THE ARBITRATOR AND INCREASING JUDICIAL REVIEW TO ENSURE BOTH DUE PROCESS PROTECTIONS AND EFFICIENCY

This Article proposes a new approach to the problems of class action arbitrations that draws heavily from the AAA rules, but with some significant changes. This approach would greatly increase the authority of the arbitrator by allowing the arbitrator to rule on the issues of arbitrability, certification, notice, settlement, and the merits of the case. But, this would be balanced by an increased judicial review at the end of the entire proceeding. However, in order for this approach to be feasible, legislatures must be willing to trust arbitrators and give them power to make decisions that have been traditionally made by courts in class-action litigation.

The key to this new approach is to allow the arbitrator to rule on all issues surrounding the case from start to finish without any type of "interlocutory appeal" to a court. Although parties to a judicial class action do have the opportunity to make interlocutory appeals after certification has either been granted or denied, parties choose to go to arbitration in order to have a quick and streamlined process.[143] A procedure such as the hybrid arbitration or the AAA arbitration that allows multiple appeals to a court loses the efficiency and speed that initially drew the parties to arbitration.

The arbitrator, though, must still protect the due process rights of the absent class members, even if there is a valid waiver of constitutional protections. The arbitrator should follow the requirements of Rule 23 and Supreme Court case law concerning certification, notice, and adequacy of representation. These requirements would have to be codified in either a uniform state law or as an amendment to the FAA.

This new law should also place restrictions on who can serve as an arbitrator in a class-action arbitration. Requiring that each arbitrator have a law degree is not an unreasonable requirement because the arbitrator is responsible for performing these important tasks. Certainly, states can require other qualifications, such as experience in class-action litigation or arbitration, if they conclude that this would best protect unnamed class members. Another alternative could be to include an "adequacy of representation" requirement for the arbitrator. Although the arbitrator certainly cannot represent any or all of the parties, the arbitrator could be required to adequately represent the due process concerns of all parties. Looking to the Federal Rules for guidance, a state could use the Rule 23(g) considerations for adequacy of class counsel to also apply to adequacy of

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[143] *See supra* notes 87–88 and accompanying text.

class arbitrator. Furthermore, states could maintain registries of approved class arbitrators or have specific training requirements for class-action arbitrators. These precautions need to be taken in order for the parties and the public to trust the arbitrator to act in a just manner when proceeding though the action from start to finish.

Once the arbitrator has concluded with the entire action, the parties to the dispute need to have some access to meaningful judicial review. Clearly, FAA § 10 review is not sufficient for a proceeding with such magnitude as a class action. A revision to the judicial review provisions of the FAA, then, will be necessary.[144] The judicial review should be available for a judge to review all aspects of the class action, including certification, notice, and the merits of the case. Because most class action appeals are heard on an "abuse of discretion" standard,[145] it seems to be an appropriate standard for review of an arbitrator's decision. However, Congress or state legislatures could expand the review if they find a broader review more appropriate.

The final issue to be addressed is confidentiality. Confidentiality is crucial to any ADR process, including arbitration.[146] For this reason, confidentiality should be maintained even in class arbitration. This confidentiality should not be limitless, however. As in the AAA rules, each class member should have the right to appear before, participate in, or observe the hearing.[147] Furthermore, confidentiality would need an exception for admission of evidence during judicial review. This exception would be similar to the exception for admitting evidence of arbitrator bias or misconduct that is already part of many arbitration statutes, including the RUAA.[148] Any additional exceptions to the general rule of confidentiality may have the effect of creating mistrust in the procedure.

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[144] Unfortunately, any potential revision to the FAA would be an uphill battle. Most commentators have urged revisions of the FAA, but Congress has been unresponsive. Any attempt at revising this outdated statute has been denied.

[145] *See supra* notes 87–88 and accompanying text.

[146] *See supra* note 89 and accompanying text.

[147] The ability to participate in the arbitration hearing itself, while related to confidentiality, is not a confidentiality concern. The class members are part of the action, and as such, they should have a right to know what how the action is proceeding. Even though the members are "absent" class members, this should not preclude them from information relating to the claim. Furthermore, common sense would dictate that confidentiality cannot prohibit a party to a suit from taking part in or knowing about his or her claim.

[148] *See* REVISED UNIFORM ARBITRATION ACT § 14, *reprinted in* GOLDBERG ET AL., *supra* note 2, at 633.

If the arbitrator is given increased power to conduct the hearing without interruption, and the courts are given increased power to review the decision of the arbitrator, then class-action arbitrations could be conducted in a manner that both protects unnamed class members and retains the speed and efficiency that the parties hope to gain from arbitration. This proposal requires increased trust in arbitrators, but placing qualification on arbitrators should help to increase trust in the process.